

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1471

To be argued by
THOMAS E. ENGEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1471

UNITED STATES OF AMERICA,

Appellee,

—v.—

LARRY LOMBARDI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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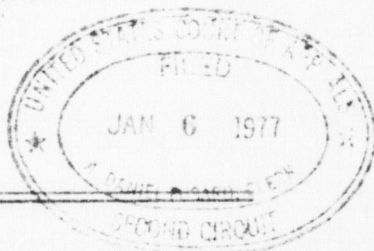


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—v.—

LARRY LOMBARDI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by Larry Lombardi from a judgment of conviction entered on October 8, 1976 in the United States District Court for the Southern District of New York after a three-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 75 Cr. 614, filed June 2, 1975, charged Lombardi, Sammy Cho, Chang Yu Ching, Cheung Kin Ping, and Lai Mong Wah in nineteen counts with various violations of the federal narcotics laws. Count One charged all five defendants with a conspiracy to violate the federal narcotics laws from January 1, 1970 to April 30, 1972 in violation of Title 21, United States Code, Sections 173 and 174, prior to May 1, 1971, and Section

846 after May 1, 1971. Count Seven charged Lai Mong Wah ("Lai") and Larry Lombardi with distribution, and possession with intent to distribute, one kilogram of heroin in September 1971, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Nine charged Lombardi with possession of two kilograms of heroin in September, 1971. Counts Eleven, Twelve, Fourteen, and Fifteen each charged Lombardi with possession of two kilograms of heroin in October, 1971. Count Sixteen charged Lombardi with possession of two kilograms of heroin in November, 1971. Count Seventeen charged Lombardi with possession of two kilograms of heroin on November 23, 1971. Count Eighteen charged Lombardi with possession of one pound of heroin in December, 1971. The remaining counts charged defendants other than Lombardi.*

Trial commenced on September 13, 1976, and concluded on September 15, 1976, when the jury found Lombardi guilty on all counts in which he was charged.**

On October 8, 1976 Judge Brieant sentenced Lombardi to a period of ten years' imprisonment with a three-year

* The defendants Lai Mong Wah and Cheung Kin Ping were convicted before Judge Brieant on June 18, 1976 after a two-week trial and were sentenced on July 26, 1976. Lai was sentenced to a term of imprisonment of fifteen years with a three-year term of special parole. Cheung was sentenced to a term of imprisonment of seven years with a three-year special parole term. The appeal of their convictions is pending. *United States v. Cheung Kin Ping and Lai Mong Wah*, Dkt. No. 76-1362.

Lombardi was not tried with these two defendants because he was a fugitive until July 5, 1976 when he was arrested by agents of the Drug Enforcement Administration. The defendants Chang Yu Ching and Sammy Cho have not been apprehended.

** In order to reduce the number of counts prior to trial, the court dismissed Counts Fourteen, Fifteen, and Sixteen.

term of special parole on each count on which he was conviction, the sentences to run concurrently. Lombardi is presently serving his sentence.

Statement of Facts

The Government's Case

A. Introduction: Nature of the Conspiracy and Roles of its Members

The evidence at trial established that from late 1970 until April, 1972, Lombardi, his co-defendants and many others in New York City, Washington, D.C., and Hong Kong were part of a large-scale heroin network that brought massive amounts of pure heroin to the United States where it was re-distributed to wholesalers who prepared it for further distribution. Lombardi was the principal wholesaler to whom most of the heroin was delivered. During the late summer and fall of 1971 Lombardi purchased approximately forty pounds of heroin for approximately \$600,000 from a partnership consisting of Yuin Kwei Sang, ("Yuin") and Lai Mong Wah ("Lai"). Yuin and Lai purchased most of the heroin sold to Lombardi from Sammy Cho, another conspirator.

Prior to being supplied by Sammy Cho, Yuin and Lai had received two shipments of heroin from Chang Yu Ching ("Chang"), a third partner of theirs who had left New York for Hong Kong and thereafter sent heroin to Lai and Yuin in New York. Lombardi also received a portion of the heroin from the second shipment from Chang as did another narcotics wholesaler, Cheung Kin Ping ("Cheung") who purchased the heroin on behalf of Liu Yueh Han, a/k/a "Dr. John Liu" ("Dr. Liu"), a customer of the Lai-Yuin partnership.

In early 1972, after the sales of the forty pounds of heroin to Lombardi, the conspirators Lai, Yuin, Cho and two others known as "Ah Sung" and "Ah Dee" met in Hong Kong to arrange a shipment to the United States of twenty-two pounds of heroin, some of which was intended for resale to Lombardi. The arrangements were made, and a seaman was hired to smuggle the heroin into the United States. On April 3, 1972 the seaman landed with the heroin on a dock in Miami, Florida and gave it to Cho and Cheung who had met the boat. Moments later, all three were arrested and the heroin was seized by agents of the United States Customs Service, thus bringing the conspiracy to a close.

B. The Chang, Yuin, and Lai Partnership

1. The First Shipment

In early 1970 Yuin met Lai and Chang in a mah-jong club in Chinatown and shortly thereafter, the three of them had several conversations about narcotics.* (Tr. 73-74)** Lai, Chang, and Yuin each agreed to put up \$1500 to purchase heroin in Hong Kong. Chang there-

* Yuin pleaded guilty on May 5, 1976 to one count of Indictment 72 Cr. 1148 charging distribution of heroin in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). On September 16, 1976 he was sentenced to time served and a three-year term of special parole.

Yuin testified that he had first become involved in narcotics in 1969 when he traveled to Hong Kong, bought 30 ounces of heroin and had it imported into the United States in a camphor trunk. (Tr. 72).

** "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; "Br." refers to Lombardi's brief on appeal; "App." refers to the appellant's appendix; "L. Tr." refers to the transcript of the Lai and Cheung trial on the same indictment held during the period of June 7, 1976 to June 18, 1976; LGX refers to Government Exhibits at the Lai and Cheung trial; LDX refers to Defense Exhibits at the Lai and Cheung trial.

after left for Hong Kong. (Tr. 74). Near the end of 1970, Lai and Yuin went to a wharf on Staten Island where they picked up two cartons of foodstuffs containing approximately 80 ounces of heroin, approximately 20 ounces of which were white and the remainder of which was brown granule. (Tr. 75).

In March or April, 1971 Yuin delivered all the white heroin to Dr. Liu at the Woodner Hotel in Washington. Yuin met Dr. Liu who instructed him to get into a car. Later, accompanied by his friend Sung Wen Tuck ("Sung"), Yuin picked up approximately \$15,000 from Dr. Liu at his restaurant and returned to New York.* After Yuin's return he brought Lai \$10,000 in personal money orders, part of which was forwarded to Chang in Hong Kong to finance a second purchase of heroin. (Tr. 105-106; GX 1).**

2. The Second Shipment

Chang received the money in Hong Kong, and in June or July 1971, Chang sent Lai and Yuin more heroin concealed in coffee tables. A sailor came to the Golden Star Bar where arrangements were made by Lai and Yuin to deliver the coffee tables to the "stash" at 133 East 4th Street. (Tr. 79-81).

* This sale to Dr. Liu was corroborated by a stipulation of the testimony of Sung who unwittingly accompanied Yuin both to the Woodner Hotel and to the Peking Restaurant (Tr. 255), and by registration cards of the hotel which were also introduced to show that Dr. Liu stayed there on numerous occasions in the first half of 1971. (Tr. 254; GX 31).

Dr. Liu, who was named as an unindicted co-conspirator, died in February or March, 1975. (Tr. 158; L.Tr. 191-92).

** The brown heroin was sold too, but it took a long time. Lai sold some of it, and Yuin sold another amount to a person named Sandy. (Tr. 78-79).

The sailor delivered the heroin shortly after the discussion to Lai and Yuin outside the 4th Street address. (Tr. 81). A day or two later, Lai and Yuin dismantled the coffee tables. (Tr. 82-83).

In August Dr. Liu called Yuin for more heroin and sent his bodyguard Po Leung and Cheung to Yuin to pick it up. Yuin gave eight ounces of heroin to Cheung who was to be responsible for payment. (Tr. 87). Thereafter, Yuin sent his friend Sung to the Peking Restaurant where Dr. Liu paid him \$2,500. Sung forwarded this money to Yuin. (Tr. 83-85).

C. The Sales to Lombardi and Purchases from Cho

In the fall of 1971, in her apartment located at 77 Second Avenue, New York City, Lai introduced Yuin to Larry Lombardi as a customer for their narcotics business. Lombardi requested a sample of heroin which Lai furnished, and the three discussed an approximate price of \$15,000 per kilogram of heroin. (Tr. 86-87).

Shortly thereafter Yuin and Lai agreed to sell Lombardi approximately one and a half kilograms of heroin. (Tr. 87-88). Lai and Yuin went to 133 East 4th Street to get the heroin and took it to Lombardi's apartment at 95 East Broadway.* Yuin waited on the landing while Lai took the heroin inside Lombardi's apartment. (Tr. 89). Two days later Lai took Yuin back to Lombardi's apartment, this time bringing him inside, where Lombardi paid them \$20,000 and told them that there-

* Chiu Kwan Tsi testified that he was the landlord at 95 East Broadway and that during 1971 he leased Apartment # 6 at that address to a Thomas Tripolino whom he identified in court as the defendant Lombardi. (Tr. 195-97).

after they should package the heroin in five-ounce packages. Yuin and Lai took the money back to the "stash" on 4th Street. (Tr. 90).

Lombardi called Yuin one week after the first transaction and requested one and a half kilograms of heroin which Yuin prepared and delivered to Lombardi. (Tr. 91-93). On this occasion Lombardi taught Yuin how to test the quality of the heroin he was supplying. Lombardi poured oil into a beaker and placed heroin in a test tube. He placed a cardboard piece over the beaker with two holes in it, one to hold the test tube and the other to hold a thermometer. Lombardi then heated the oil on a stove to a temperature of 200 degrees at which point the heroin turned to a dark brown color, a result that Lombardi said proved that the heroin was of good quality. (Tr. 93-95). Lombardi performed another experiment on the heroin by placing a sample on a porcelain dish and adding a chemical with an eyedropper. When the white powder turned green, Lombardi said that the heroin was confirmed to be of good quality. (Tr. 96).

Two days later, Lombardi paid Yuin over \$20,000 for the one and a half kilograms. A week thereafter, Yuin returned to Lombardi's apartment and delivered more narcotics. (Tr. 97). While he was there, some loud knocks were heard at the door, and Yuin hid in Lombardi's apartment while a heated argument, in a language other than English or Chinese, occurred between Lombardi and several visitors. (Tr. 98, 104). After the shouting subsided and the visitors left, Lombardi told Yuin that he could leave the apartment. Two days later, Lombardi paid \$14,000 to Yuin, deducting \$6,000 from the normal \$20,000 because he complained the goods were of poor quality. (Tr. 104-05).

On another occasion when Yuin went to Lombardi's apartment, Lombardi introduced him to his nephew, Americo Spagnuolo.* Yuin, Lombardi, and Spagnuolo counted over \$20,000 that had been paid for narcotics. (Tr. 108).

In October, 1971 Yuin met Sammy Cho at a mah-jongg club in Chinatown. (Tr. 109). Cho told Yuin he had fifteen pounds of heroin for sale and asked him if he could sell it. Yuin purchased the heroin for a total of approximately \$90,000 and resold all of it to Lombardi. (Tr. 110-11).

On one occasion Yuin and Lombardi arranged to meet at a gas station on East Broadway for a heroin delivery. Cho drove Yuin to the gas station and stopped momentarily while Yuin handed Lombardi the heroin. (Tr. 111). Yuin was again paid over \$20,000 for the narcotics. (Tr. 112).

Later, in October or November, 1971, Cho supplied Yuin with twenty more pounds of heroin, all but a slight portion of which was sold to Lombardi. (Tr. 114).*

* Spagnuolo, who was also known as "Madick" or "Manick", and was named as an unindicted co-conspirator, was found murdered with six bullets in his head prior to the indictment in this case. (Tr. 181, 207, 217).

** Yuin sold a half kilogram of heroin to Special Agent John S. Taylor of the Drug Enforcement Administration on November 17, 1971. (Tr. 25-30, 114-15, 255-56; GX 48F, 48G). Prior to that sale, Yuin had sold approximately an ounce and given a sample of heroin to Agent Taylor on November 3 and November 16, 1971, respectively. (Tr. 19, 22-25, 114-15, 255-56; GX 46B, 46D, 47B). These three distributions of heroin were charged, together with a conspiracy count, in Indictment 72 Cr. 1148. Yuin left for Hong Kong at the end of 1971 and remained there until he was extradited to the United States. (Tr. 136, 143-44). The United States had first requested his extradition in October,

[Footnote continued on following page]

On November 23, 1971 Yuin sold Lombardi another kilogram of heroin.*

Around the end of November or beginning of December, 1971 Lombardi told Yuin to come to a shop Lombardi operated on Eldridge Street. (Tr. 115-16).** When Yuin arrived, Lombardi told him he would send his nephew Spagnuolo to pick up the heroin at Yuin's and Lai's "stash" on 4th Street. Lombardi gave Yuin the key to the trunk of Spagnuolo's car, and Yuin returned to the "stash." Later that day, Spagnuolo drove to 133 East 4th Street and Yuin put one and a half kilograms in the trunk of his car. (Tr. 116). Two days later Lombardi paid Yuin over \$20,000. (Tr. 117).

Shortly thereafter, Yuin made his last delivery, approximately ten ounces of heroin, to Lombardi. Yuin

1972; that request was defeated. Upon renewed request and after lengthy court proceedings, Yuin was extradited in October, 1974. (Tr. 142-43). Shortly after his arrival in the United States, Yuin began to cooperate with agents of the Drug Enforcement Administration and the United States Attorney's Office. (Tr. 51-52).

* This sale to Lombardi was corroborated by the testimony of two agents of the Drug Enforcement Administration. Yuin testified that he had tried to sell this kilogram to Special Agent Taylor, but that when Taylor declined to purchase the narcotics, Yuin took the narcotics to Lombardi at 95 East Broadway. Yuin was observed by Special Agent Mathew Maher leaving his apartment at 80 First Avenue and going into 133 East 4th Street and then leaving that address for 95 East Broadway. Yuin was carrying a paper bag when he entered 95 East Broadway. (Tr. 31, 213-15).

** Rudolph Guinta, a jewelry maker, testified that he sublet premises from mid-1971 until May or June, 1972 to Lombardi at 24 Eldridge Street. Guinta testified that Lombardi's partner in the business was his nephew. The business itself was described as "selling lots of clothes, toys and all kinds of garbage." (Tr. 203-07).

tried again to sell the heroin to Agent Taylor but sold it to Lombardi when Taylor said he was not interested. Lombardi paid him \$8,000. (Tr. 118-20).

D. Relocation to Hong Kong and the Importation of Twenty-Two Pounds of Pure Heroin

In late November or early December, 1971 Lai left for Hong Kong. (Tr. 135). Cheung and Cho followed in early December. (Tr. 136). Yui left New York for Hong Kong in late December where, a few weeks after his arrival, he met Lai, Cheung, Cho, and two men known as Ah Dee and Ah Sung in a restaurant in Hong Kong. There they discussed cooperating to purchase narcotics to be shipped from Hong Kong to New York. (Tr. 136-37). Ah Dee and Ah Sung were given the assignment of purchasing the heroin on behalf of the group and recruiting a sailor to bring it in; Cheung and Cho were then to arrange for picking up the heroin when it arrived in the United States. Lai and Yui were given responsibility for selling the heroin once it reached New York. Yui was planning to sell the heroin either to Lombardi or to Agent Taylor. (Tr. 138). After a later meeting in Cheung's room at the Hotel Singapore, they agreed that each participant would put up 20,000 Hong Kong dollars (U.S. \$4,000) for each 25 ounces to be purchased. (Tr. 137-39).

A seaman named Ting Yee Fong, was then recruited to bring the 22 pounds of heroin into the United States. (Tr. 139). Ting arrived in the continental United States on the evening of April 3, 1976 when he was arrested along with Cho and Cheung who had come there to meet him. In the car in which Cho and Cheung were seated customs agents found and seized the heroin. (Tr. 257).*

*The evidence of the arrests and seizure was admitted by stipulation, as was the evidence that the twenty-two pounds of heroin seized was analyzed to be 99.9% pure.

The Defense Case

The defendant presented no evidence.

ARGUMENT

POINT I

Prior Consistent Statements of Yuin Were Properly Admitted.

Lombardi seeks reversal of his well-merited conviction on the ground that testimony of Yuin from a prior trial was improperly admitted into evidence on Yuin's redirect examination. This contention is without merit.

In his direct examination Yuin testified that Lombardi's nephew, Americo Spagnuolo, had helped Yuin and Lombardi count over \$20,000 in payment for narcotics. Yuin further testified that Spagnuolo had picked up heroin from Yuin and taken it to Lombardi. (Tr. 107-09, 116-17). On cross-examination, in an effort to impeach Yuin, defense counsel asked Yuin if he had ever before testified about Lombardi's nephew; Yuin replied that he could not recall. Then, in the presence of the jury, defense counsel requested a stipulation from the Government that Yuin had not previously testified about Spagnuolo. The prosecutor objected that the request should not have been made in the presence of the jury. The Court agreed that stipulations ought to be taken up in the absence of the jury. (Tr. 166-67).

At a recess the Assistant United States Attorney conceded that Yuin had not testified about Spagnuolo before, but explained that Spagnuolo had been murdered before

Yuin testified in the grand jury, and therefore, testimony about him did not "seem to further any purpose that the grand jury was considering." (Tr. 181). The court observed that these were "matters for redirect" and once the stipulation was agreed upon, the Government could deal with it as it wished on redirect. (Tr. 181). Thus, although he received a clear signal that the Government would seek to rebut any charge of recent fabrication, defense counsel went ahead and concluded his cross-examination by announcing the stipulation "that Mr. Yuin has never testified before the grand jury or in the prior trial in this case regarding Larry's nephew or any transactions with him." (Tr. 182).

On redirect examination Yuin was asked whether he had ever been asked about Larry's nephew (Spagnuolo) in the grand jury or at a prior trial; whether Larry's nephew had been on trial at any time when Yuin had testified; and whether Larry's nephew was dead or alive. Yuin said he had the impression he had testified about the nephew but did not know where. He also testified that he did not know whether the nephew had been on trial or whether the nephew was dead or alive. (Tr. 187-88).

At that point the Assistant United States Attorney asked Yuin whether he recalled a portion of his testimony from the prior trial of Lai and Cheung. That testimony, in consonance with his essential testimony at Lombardi's trial, described in summary fashion the distribution of narcotics from Cho to Lombardi with Yuin acting as a middleman.*

* The full question and answer are as follows:

"Q. About this time, did you have occasion to meet a person by the name of Sammy Cho? A. Around September and October I met Sammy Cho. He told me he also has

[Footnote continued on following page]

Objection was taken before Yuin answered on the apparent ground that the prior testimony was not inconsistent with his testimony at Lombardi's trial and had nothing to do with his nephew. The judge overruled the objection as follows:

"Implicit, if not expressed during the cross-examination of this witness, is the conception that the inclusion of Larry's nephew is a fabrication. The nephew is not on trial. Indeed, he is dead. So the only purpose of the cross-examination can be to suggest that the whole business about Larry and his nephew, which took place in a single incident, is a cooked-up job.

The Government can meet that inference, which is a very clear one to me, and about the only thing that I derive from the cross-examination, they can meet that by the prior consistent testimony, and I will adhere to my ruling." (Tr. 189-90).

The witness was then permitted to answer that he recalled the testimony. He was thereafter permitted to testify that he recalled from the previous trial a second question and answer about Lombardi's narcotics activities.* (Tr. 190-91).

narcotics. He said he has 15 pounds. He said, 'Do you have any connections that you can distribute to me? You have to take the whole lot.' First I took 5 pounds from him and put together with what I already had on hand, all the stuff was placed in the 4th Street apartment. Then later on I sold the 5 pounds and some of the other we had on hand already to Larry. After that was sold Sammy Cho had 10 more pounds, he also brought the 10 pounds. We paid with all the money that we had pulled together." (Tr. 188).

* The second question and answer are as follows:

"Q. How much in total were you paid by Lombardi for the 15 pounds? A. He paid me \$15,000 a kilo. Sometimes \$16,000 a kilo. Sometimes he said the goods are not up to standard, then he took some of the—cut the price down. I did not argue with him." (Tr. 190-91).

Rule 801(d)(1)(B) of the Federal Rules of Evidence allows the admission of prior testimony of a witness if it is "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." Lombardi argues that Yuin's prior testimony should not have been admitted because (1) it was not consistent with his trial testimony and (2) it did not antedate his motive to testify falsely. These contentions do not withstand analysis.

First, it is clear that defense counsel sought to undermine Yuin's credibility by suggesting that his failure to mention Larry's nephew in prior testimony demonstrated that his present testimony about him was fabricated. The import of Yuin's testimony about Spagnuolo was that Spagnuolo was intimately involved in Lombardi's narcotics business. As the District Court noted, the only possible reason for eliciting proof of Yuin's prior failure to mention Spagnuolo in prior testimony was to establish a basis for arguing that Yuin recently fabricated his testimony about that part of Lombardi's activities and, thus inferentially, about all of Lombardi's dealings in narcotics. Defense counsel's intimation, which was "very clear" to the able trial judge, was not only an implied, but an express, charge of recent fabrication.

In this context, the District Court correctly determined that it was proper to rehabilitate Yuin's credibility by establishing on redirect examination that at a proceeding where Lombardi was not on trial, he had testified to Lombardi's involvement in the narcotics transactions. A trial court is vested with broad discretion in its determinations to admit or to exclude prior consistent statements. *United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972). Moreover, the jury must be given every opportunity to consider prior consistent statements when

ever it is "reasonably possible" that the prior consistent statement was made before the motive to fabricate or to contrive arose. *Applebaum v. American Export Isbrandtsen Lines*, 472 F.2d 56, 61 (2d Cir. 1972). See *DiCarlo v. United States*, 6 F.2d 364, 367 (2d Cir.), cert. denied, 268 U.S. 706 (1925); *United States v. Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), rev'd on other grounds, 353 U.S. 391 (1957); *United States v. DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971); *United States v. DeLaMotte*, 434 F.2d 289, 293 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971); *United States v. Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), cert. dismissed, 411 U.S. 923 (1973).

As to the contention that Yuin's motive to fabricate arose before the earlier trial, it is well-established that if there are several motives for falsifying ascribed to a witness, and it is reasonably possible for the jury to find that a proffered prior consistent statement antedated at least one of these motives, the court should not exclude the statement. *United States v. Grunewald*, *supra*; *United States v. Fayette*, 388 F.2d 728, 735 (2d Cir. 1968). This principle of admissibility is supported by the common-sense view that the jury may simply find that some of the motives were non-existent or were insufficient to induce a fabricated or contrived story.

At trial defense counsel attempted to highlight Yuin's purported motive asserted recent fabrication to help obtain a conviction against Lombardi. During cross-examination and again on summation defense counsel noted that Yuin had met with the prosecutor just days before the Lombardi trial. (Tr. 147-48, 295). Again on summation, defense counsel charged recent fabrication for the purposes of this trial, contending that Yuin added testimony about a second chemical test on heroin in Lombardi's apartment because "he is under a lot of pressure, he wants to get a conviction here to get the best possible deal he can get." (Tr. 292). Later, counsel argued:

"I submit to you if that's what happened, he would have said that all along. The fact that he comes

before you now and tries to gild the lily is just one more example of what this man will do. He will do anything to get himself the deal that he thinks he is going to get." (Tr. 293).

It is obvious from these examples that defense counsel was trying to establish a special motive that Yuin was said to possess at Lombardi's trial. See *United States v. Mitchell*, 385 F. Supp. 161, 163 (D.D.C. 1974) (Sirica, J.). It was fair for the Government to meet such contentions with proof and argument that Yuin had testified about Lombardi's involvement at a prior trial involving different defendants well before he could have been concerned about helping the Government obtain a conviction against Lombardi. The prior consistent statements were properly admitted for this purpose.* *United States v. Rodriguez*, 452 F.2d 1146, 1148-49 (9th Cir. 1972); see *United States v. Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

Finally, Lombardi's claims of prejudice on this issue are greatly exaggerated. The prior consistent statements were utterly redundant of Yuin's testimony on direct examination. Cf. *Railway Express Agency v. Epperson*, 240 F.2d 189, 193-94 (8th Cir. 1957). Moreover, to the extent that defense counsel now claims that the probative value of the statements was diminished by the fact that Yuin's motive to lie existed at the first trial, this was an argument that could have been made to the jury. However, trial counsel apparently did not think that the issue was important enough to require even that the argument be made. Given the relative insignificance of this matter at trial, it is apparent that the admission of this evidence does not warrant the reversal which Lombardi seeks.

* Although under Rule 801(d)(1)(3) prior consistent statements are admitted as substantive evidence, the Government used them here only on the issue of credibility. See 4 Weinstein & Berger, *Evidence* at 801-99 (1975).

POINT II**The Trial Judge's Comment on The Evidence Was Proper.**

Lombardi asserts that his conviction must be reversed because the trial judge made an unwarranted and prejudicial comment to the jury in his charge to the jury concerning circumstantial evidence of Lombardi's intent to distribute heroin. This contention is without merit.

Prior to summations the trial judge held a "charge conference" with counsel during which he outlined the charge he would give the jury. During the conference the following colloquy occurred between defense counsel and the Court:

"Mr. Joy (defense counsel): There has been no testimony about resale of the heroin.

The Court: Didn't have to. All he had to do was possess it with intent to distribute. I will say distribution instead of resale. There is a very strong circumstantial evidence here, and you brought a lot of it out.

Here is this man living there in what practically is a slum, and he buys this tremendous quantity of almost pure heroin. It is very unlikely that a fellow making that kind of purchase for that kind of money, of that quality goods, in that whole context, was buying for his own usage. There is no evidence he is even an addict.

Mr. Joy: 40 pounds would be kind of tough to use personally, I think, regardless of where you lived." (Tr. 235-36).

The Court then charged the jury as follows:

"There is no direct evidence that Lombardi actually distributed any narcotics. There is, however, some circumstantial evidence in the case bearing on his intent which the jury may consider in determining whether the drug was possessed with intent to distribute.

In that regard, the record appears to show that Lombardi lived modestly in an old tenement house on East Broadway, that he had a store in which items of small value were sold and that his life style would hardly suggest that he could pay such large amounts of money for heroin unless he was intending to resell it.

There is no indication that he himself was a user of heroin, and your common sense will tell you that users of heroin ordinarily do not buy such large quantities of almost pure heroin as was testified to by the witness Yuin in this case, so that in view of the situation of the defendant as appears in the evidence and the large quantity and high purity of the alleged heroin, you may, but you need not, infer from those circumstances alone that the purpose of acquiring the heroin, if he did so, was to possess it with intent to distribute it to others.

However, that's a factual question and it is a question for your sole determination because you decide all issues of fact in the case." (Tr. 343-44).

After the charge was given, defense counsel objected to this portion of it. However, in doing so, defense counsel failed to raise his present claim that the charge unfairly bolstered the Government's proof of "intent to

distribute." Rather counsel complained about "Mr. Lombardi living modestly and that having some bearing on whether he *took* this heroin." (Tr. 353) (emphasis added).

It is clear from the foregoing that defense counsel knew that the trial judge was going to charge the jury that Lombardi's living conditions might properly be considered by them as circumstantial evidence that Lombardi possessed the heroin with intent to distribute it. Yet no request was made that the judge omit the remark from his charge; nor after the charge was given, did counsel articulate the objection raised on appeal: that the charge improperly commented on proof of Lombardi's intent. The objection was thus waived. Fed. R. Crim. P. 30; see *United States v. Araujo*, 539 F.2d 287, 291 (2d Cir. 1976).

Moreover, Lombardi's intent to distribute the heroin was never an issue at trial. The defense pressed only the question was whether Lombardi possessed the heroin at all. Defense counsel conceded, in effect, that the heroin had to have been intended for resale by saying that "40 pounds of heroin would be tough to use personally, I think, regardless of where you lived." * The thrust of the defense summation and the only defense seriously proffered to the Government's case were that the principal Government witness Yuin was a liar and a scoundrel. Nowhere did defense counsel argue that there was no evidence that Lombardi resold, or intended to resell, the heroin he got from Lai and Yuin.

* Although this remark might be considered an oblique objection to the judge's remarks on circumstantial evidence, they are more clearly fairly construed simply as a concession that the heroin was intended for resale.

The comment, in any event, was well within the discretion of the trial court. It is settled that

"[s]o long as the trial judge does not by one means or another try to impose his own opinions and conclusions as to the facts on the jury and does not act as an advocate in advancing factual findings of his own, he may in his discretion decide what evidence he will comment upon." *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

Here, the trial judge merely directed the jury's attention to certain circumstantial evidence of "intent to distribute" so that the absence of direct proof would not confuse or sidetrack the deliberations.* In commenting on the circumstantial evidence, moreover, the trial judge specifically told the jury that Lombardi's intent to distribute was an issue of fact for the jury and "a question for [the jury's] sole determination." (Tr. 344).** There was, thus, no abuse of the very broad discretion vested in the trial court to comment upon the evidence.

* Lombardi contends on this appeal that the fact of his modest circumstances was circumstantial proof that he was not involved in the narcotics business because his profits from narcotics would have allowed for a more comfortable manner of living. (Br. 18). What ever the merits of this logic, it was earnestly and unsuccessfully propounded to the jury by Lombardi's counsel in his summation. (Tr. 289-90).

** The trial judge similarly instructed the jury at the beginning of his charge:

"However, you are the judges of all issues of fact. It is for you to determine all factual questions in the case. In determining what evidence you will accept as true, you make your own evaluation of the testimony given by each of the witnesses, and you determine for yourselves what you believe to be the truth and the degree of weight or significance that you choose to give to that testimony." (Tr. 314).

United States v. Natale, 526 F.2d 1160, 1167 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Tourine*, *supra*; see *United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *Radiation Dynamics, Inc. v. Goldmunt*, 464 F.2d 876 (2d Cir. 1972); *United States v. Dozier*, 522 F.2d 224, 227 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States v. DeLaMotte*, 434 F.2d 289, 291-92 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

POINT III

Returning a witness' diary to him during a previous trial was not improper.

Lombardi claims that this Court must remand this case to the trial court for a hearing to determine whether a new trial must be granted because the Government at the previous trial of Lai and Cheung returned the witness Yuin's diary to him.* This argument can only be reviewed in the context of a more complete statement of the facts than that which Lombard provides the Court.

During the luncheon recess of the third day of the trial of Lai and Cheung—with Yuin still on cross-examination—the Government inquired of him whether he kept a diary. He said that he did and produced two books to show to the Assistant United States Attorney trying the case. The diary, which was very lengthy,

* This point was raised by Lai in the appeal of her conviction and is presently *sub judice*. *United States v. Cheung Kin Ping*, Dkt. No. 76-1362. Much of the material presented herein is a re-presentation of the facts and arguments presented to this Court in the earlier appeal.

was written almost entirely in Chinese characters. The Government took the position that the diary, which covered a period from roughly January 1, 1975, up to the date of the trial, was not 3500 material because it was not in the Government's possession, but that it might contain other material, perhaps with *Brady* implications, which the defense had a right to know and to inquire about (L. Tr. 255-56). The court ruled that the diary, was not 3500 material but that it "might possibly be *Brady* material." (L. Tr. 258-59). The court had the diary marked for identification and made available to defense counsel (L. Tr. 259; LGX 3545, 3546). The court then said that the witness Yuin should be available for cross-examination on the diary after the interpreter for the defendant Lai had a chance to review it. The court further stated that it was his wish that the diary should not leave the courthouse (L. Tr. 273).

On redirect examination Yuin interrupted an answer he was giving to complain about his diary being read by the defense, and the diary was returned to the Assistant United States Attorney (L. Tr. 274).

Later that same day, after Yuin left the stand, counsel for Lai stated that only the first page of the diaries had been translated and represented he wanted to inquire further of Yuin as a result of that translation (L. Tr. 296). The Government then made application to have the diary returned so that it might be reviewed by the Assistant United States Attorney for any matters touching upon the *Brady* principle after which the Government could submit the matters which were of *Brady* character to the defendants and those matters which were questionable to the Court for *in camera* inspection and ruling (L. Tr. 297-98).

The court, observing that Yuin might have, on the one hand, Fifth Amendment rights with respect to the

diary, and, on the other hand, legitimate fears for the safety of himself and others if all the material were in the hands of his enemies, agreed with the Government's position (L. Tr. 299). The court then directed the Government to have the diaries translated as quickly as possible and ruled that the witness was "entitled to the security and privacy of his diary" urging the Government, in the meantime, to discover whether the material in the diary might be turned over to the defendants without any harm coming to anybody (L. Tr. 301-02).

That evening the Government met with the witness and the Government interpreter, Mrs. Laura Ho, both of whom agreed that the translation of the diary would consume a couple of weeks. (L. Tr. 375). The Assistant United States Attorney then directed the witness to cull out of the diaries those matters that concerned his relations with the Government, give those to the interpreter, who would review these portions with him before translating them for the Assistant United States Attorney (L. Tr. 378-79).

On the following day the court suggested that the procedure be reversed whereby Yui would cull out the portions he did not regard as privileged, turn those over to the defense, and give the privileged portions to the Government for its review (L. Tr. 380). Counsel for Lai, for his part, repeated his desire to recall Yui based on the translation of the first page, and disputed the Government's two-week estimate, pointing out that some of the material was in English (L. Tr. 376-77). The judge ruled, however, that any questions about Yui's proficiency in the English language would be cumulative.

The diary, then in Yui's hands, contained weather reports and records of correspondence with his daughter

in Shanghai, as well as records of his meetings with his own lawyer. The latter were undoubtedly privileged (L. Tr. 377). Also contained in the diaries were detailed—and as the Court observed, “self-serving”—records of his meetings with the Assistant United States Attorney and the Drug Enforcement Administration agent working on the case (L. Tr. 377).

Lai's counsel, upon hearing that the witness had his own diaries in his control, moved for a mistrial. The motion was denied, L. Tr. 381-82). Shortly thereafter, Lai's counsel questioned Special Agent John S. Taylor of the Drug Enforcement Administration extensively on cross-examination about his knowledge of the contents of the diary (L. Tr. 472-75, 477-78, 493-97).

On Friday, June 11th, the Assistant United States Attorney reported that he had to meet with Yuin's lawyer with respect to any privilege that Yuin might wish to assert as to the contents of the diary (L. Tr. 591-92). Lai's counsel again objected that Yuin still had his own diary and claimed that Yuin might be tampering with it. The court observed that there was no evidence of tampering (L. Tr. 593-95).

On Monday, June 14th, the Government produced for the defense those portions of the diaries which dealt with Yuin's relationship to the Government (L. Tr. 689; LGX 3545A, 3546A). Only one copy was supplied because the characters were so miniature that they could not be reproduced or photocopied (L. Tr. 690).

On the following day, the Assistant United States Attorney reported to the court that he had prevailed upon Yuin to turn over the rest of the diaries to the defense. The rest of the diaries were turned over with the proviso that these portions be read by the interpreter

only. The interpreter, however, might then translate and discuss the contents with the defendants and their lawyers. There was no objection to this procedure. (L. Tr. 787-89; LGX 3545B, 3546B).

At the close of the day, Lai's counsel stated he would request a mistrial on the grounds that there were pages purportedly in English and dealing with the Witness Protection Program which were allegedly missing from the diaries. (L. Tr. 941). The court stated that it would allow Yuin to be examined outside the presence of the jury as to whether he had removed any pages from his diary, and that if Yuin said that he had, he should be examined as to that with the jury present. (L. Tr. 942-46).

The following morning the Assistant United States Attorney reported that Yuin had told him that no pages had been removed from the diaries. (L. Tr. 957). Lai's counsel then stated his intention to introduce only those three or four pages of the diary with handwriting in English not for the truth of the contents but rather as specimens of Yuin's English handwriting. (L. Tr. 958-59). The Government countered by stating its intention of offering the original letter from the United States State Department dealing with his wife's immigration problems that Yuin copied into his diary in English. (L. Tr. 962-65). The pages from the diary and the State Department letter from which they were copied were then introduced into evidence by stipulation. (L. Tr. 992-93; LDXH; LGX 101). Yuin was never recalled by the defense, although he was available for that purpose.

Two full months prior to trial in this case, the Government made available to defense counsel the entire trial transcript of the Lai and Cheung trial. In addition, all the 3500 material that mentioned Lombardi, was supplied

to defense counsel a week before trial. (Tr. 35). The matter of Yuin's diary had been fully mooted in the Lai and Cheung trial after which the diaries were returned to Yuin, there being no directive from the trial court and no reason otherwise not to do so. The diaries still, of course, had not been translated from the Chinese.

Despite the fact that defense counsel must be taken to have known about the diaries for a substantial period before trial and despite the obviously difficult task of having them translated, defense counsel waited until after Yuin's direct examination had begun to request their production. The Government declined to produce the diaries. The trial court, which had presided over the Lai and Cheung trial as well, refused to order the Government to produce them. (Tr. 99, 103, 127-34). The trial court ruled that the diary was not subject to production pursuant to 18 U.S.C. § 3500 because it was not a statement made to the Government and because the diary was never in the possession of the Government (except for that "fleeting period" during which the diary was handed by the witness to the prosecutor to defense counsel). (Tr. 130, 133). The trial court further ruled that the diary was not required to be produced pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1969) because the prosecutor was not obliged to allow complete discovery of his files. *United States v. Agurs*, — U.S. —, 44 U.S.L.W. 5013 (June 24, 1976).*

*The trial court's thorough consideration of this issue is evident from these other conclusions it made: (1) at the first trial the Chinese-speaking defendants, and their interpreter and counsel, never made any use of the contents of the diary despite the fact that it was available to them for an adequate period of time; (2) every entry in the diary was made well after the events concerning Lombardi took place; and (3) the diary was the personal property of the witness who had a right to be secure in possession of it.

Defense counsel questioned Yuin about the diary on cross-examination and established that the diary covered only the period Yuin was in jail following his extradition — mid-November, 1974 to mid-July, 1975. Yuin also testified that he did not keep a diary at any other time during his life. (Tr. 152-53). At no time did defense counsel question Yuin about retention of the diary during and after the previous trial, his ability to alter the diary during those periods, the nature of the diary's contents or his use of English words and phrases in the diary.

Viewed against these facts, Lombardi's contention that a hearing should be held is utterly without merit. First, defense counsel knew, or should have known, about the existence of the diaries well before trial. Likewise, he knew, or should have known, that the diaries were in Chinese. Yet no request was made for the production for the diaries until after the trial had begun. To have granted the defense a continuance to have the diary made available and translated would have required a delay of weeks in the trial which lasted a total of only three days. See F.R. Evid., Rule 403, permitting exclusion of relevant evidence—which this was not—if its admission would engender undue delay. The failure to have raised this point at a time when it could have been decided without delaying the proceedings below must be deemed a waiver.

Secondly, the diaries were returned to Yuin after the Lai and Cheung trial which concluded on June 18, 1976.* To have preserved the record of the Lai and Cheung trial, therefore, does not make sense in the context of this appeal because Yuin could have done anything

* Lombardi was arrested on July 5, 1976. Yuim knew from approximately that date, therefore, that he would have to testify again.

he pleased to the diary between the two trials, especially after he was on notice from the prior trial that it might again have to be produced. Trial counsel for Lombardi, nevertheless, never asked Yuin whether he had destroyed or altered the diary or had changed any characters in it.*

Assuming that the trial record of the first trial is properly raised by Lombardi, an assumption unwarranted by the facts, we submit, it is clear that the Government's actions in the first trial deprived neither defendant there nor Lombardi of a fair trial.

With respect to the first trial, it is clear that the prosecution acted entirely reasonably in response to the difficult and unforeseen situation that arose during that trial. The diary itself—which did not concern the content of Yuin's testimony against the defendants, since it covered a period of time years after the transactions involved, but only his meetings with Government personnel as well as more personal and more clearly irrelevant material—was made available to defense counsel during the trial as soon as the existence of the diary was known. Only after it became evident that translation of the lengthy document into English could not be accomplished during the trial was the diary turned over to Yuin for him to determine which passages concerned his meeting with the prosecution. This procedure was, under the circumstances, clearly reasonable; indeed, no better alternative was suggested by defense counsel.

Moreover, any assertions of misuse of the diary by Yuin are based entirely upon speculation, and are im-

* The failure to question Yuin about what, if anything, he did with the diary while he possessed it renders frivolous Lombardi's insinuation that he was unfairly bound by efforts of other trial counsel. (Br. at 8).

probable at best. The diary, of course, had been in Yuin's possession at all times prior to and even during the trial—indeed, Lombardi complains solely of what was in actuality nothing more than a return to the *status quo ante*. Most importantly, it should be noted that even after the existence of the diary became known, absolutely no use of its contents was made at trial for impeachment purposes nor has defense counsel even pointed to a single portion of the diary that even bears on Yuin's testimony or that could conceivably have been altered.

Finally, even if one were to exercise one's imagination, as the defendant wishes this Court to do, it is clear that *at most* the diary might have contained something of possible impeachment value of Yuin, although it is hard to imagine a fact of Yuin's relationship with the prosecution helpful to the defense that would not already have been made available to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1969).^{*} Particularly since the defense was already armed with a considerable amount of impeachment material concerning Yuin, the effect of any further material, assuming the judge would have allowed the inquiry, would have been minimal. Cf. *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975).

In sum, particularly in the absence of any demonstration that the diary contained anything or could be of any use to the defense; or any attempt to show a portion of the diary that had conceivably been altered; or any but the merest attempt to question Yuin concerning the diary, the claim should be rejected for what it is—an attempt to create reversible error out of pure speculation.

^{*} Prior to trial, the Government provided the defense information concerning an arrest of Yuin in Hong Kong, specifically noting that the material was being furnished pursuant to *Brady*. (Affidavit of Thomas E. Engel sworn to April 19, 1976 ¶ 15).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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